91-1770

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRED W. BEAVERS,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD
and
ADMINISTRATOR OF
THE FEDERAL AVIATION ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 7, 1992

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QUESTION PRESENTED

WHETHER THE NTSB FAILED, IN FASHIONING RULES GOVERNING ITS OWN PROCEDURES FOR ACCEPTING OR REJECTING LATE FILED DOCUMENTS, TO TAKE INTO ACCOUNT A CRITICAL ELEMENT, THAT OF EXISTENCE OF PREJUDICE OR LACK THEREOF, TO AFFECTED PARTIES.

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NATIONAL TRANSPORTATION SAFETY BOARD
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The unpublished opinion of the Fifth Circuit Court of Appeals No. 91-4728, and the Order of the National Transportation Safety Board EA-3359 are attached as Appendix A and B respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

REGULATORY PROVISIONS

49 CFR 821.48(a) states: Appeal brief. Each Appeal must be perfected within 50 days after an oral initial decision has been rendered by filing with the Board and serving on the other party a brief in support of the Appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.

STATEMENT OF THE CASE

Fred W. Beavers (hereinafter "Beavers") seeks review of the Judgment of the Court of Appeals for the Fifth Circuit affirming the National Transportation Safety Board's Order EA-3359 (hereinafter "NTSB"), which Order

1. Dismisses Beavers' Motion to Accept Late Filed Brief; and
2. Grants the Motion of the Administrator of the Federal Aviation Administration (hereinafter "FAA") to Dismiss Beavers' Appeal to the NTSB; and
3. Denies Beavers' Motion for an Extension of Time in which to file an appeal brief; and
4. Dismisses Beavers' Appeal.

Section 601 of the Federal Aviation Act of 1958, as amended, provides the FAA with authority to issue rules and regulations. 49 U.S.C. 1421. Under Section 609 of the Act, 49 U.S.C. 1429, the FAA is empowered to reexamine the certificate held by any airman in the enforcement of its rules. If the FAA decides to proceed with a

re-examination of a certificate holder ("certificate action"), certain rights are afforded to the airmen under Section 609. He is to be advised of the proposed certificate action, and be given an informal opportunity to answer any allegations that would give rise to the revocation, suspension or modification of his certificate. If the issue is not informally resolved, the FAA may issue an order, suspending, revoking, or modifying such certificate, which order may be appealed to the NTSB for a *de novo* review. The NTSB is authorized by Section 609 of the Act, after notice and hearing, to amend, modify, or reverse the FAA's order.

The NTSB has established certain rules involving the conduct of hearings dealing with certificate actions. These may be found in 49 C.F.R. Part 821.35 and Section 821.37 *et seq.* After hearing, the ALJ may issue a written or oral decision (49 C.F.R. 821.42), and if issued orally, as is the practice of NTSB ALJ's (and as was done in the instant case), a copy of the oral initial decision, excerpted from the transcript of the record, "shall be furnished to the parties by the Office of Administrative Law Judges." 49 C.F.R., 821.42(d).

An ALJ's decision left unappealed becomes a final order. The Board may, on its own initiative, decide to review the initial decision within twenty days of its issuance. 49 C.F.R. 821.43.

Under 49 C.F.R. 821.47, either party may appeal from an ALJ's initial decision by filing a notice of appeal with the NTSB within ten days of the initial decision. (Beavers' filed a timely notice of appeal with the NTSB). An appeal is to be perfected within fifty days of an oral decision by filing a brief on appeal. Those appeals not perfected *may* be dismissed by the Board on its own initiative, or upon motion by a party.

The perfection of an appeal by way of filing a brief is not jurisdictional, and a brief not timely filed may be accepted by the Board upon a showing of good cause. *McArtor v. Hooper,* EA-2781, served August 19, 1988.

In the instant case, Beavers was afforded all of his initial rights under Section 609 of the Act. A hearing was held; a transcript of which was made, and as mentioned, an oral initial decision was issued. An appeal was timely filed. Thereafter, as will be shown below, the clerical process went awry.

It was undisputed both before the NTSB and the Fifth Circuit that the transcript excerpt of the oral initial decision was not sent to Beavers' counsel until a time well after the expiration of fifty days after the issuance of the initial decision. It is also undisputed that the transcript of the hearing, which was required to prepare the appeal brief, was not received by Beavers' counsel until June 3, 1991. This service was not accomplished in a timely fashion to meet a filing deadline which was to be fifty days after the issuance of the oral initial decision, which itself was dated March 26, 1991.

On or about May 20, 1991, Beavers' counsel filed a motion for an extension of time in which to file an appeal brief seeking an extension of thirty days, with the FAA indicating "no objection." At the time of submitting this request, and contacting FAA to secure its acquiescence, Beavers' counsel believed the appeal brief was due during the week of May 20, 1991. FAA subsequently opposed the extension, indicating that its agreement to the extension was based on the mistaken representation by Beavers' counsel that the brief was due the week of May 20, 1991, and further, that the request for extension did not show "good cause," as required by the Board in *McArtor v. Hooper, supra.* Beavers'

counsel submitted a "Rejoinder", along with a Motion to Accept a Late Filed Brief (App. E), and an Appeal Brief (App. F). The aforesaid motion and appeal brief were both filed on June 7, 1991. Had the NTSB granted Beavers' motion for an extension, such extension would have been, under the Board's policy, for a period of thirty days, making the due date June 15, 1991. The appeal brief was filed eight full days in advance of that date. FAA replied to the Motion to Appeal a Late Filed Appeal Brief on June 24, 1991, (App. D) to which Beaver's counsel responded on June 26, 1991 (App. C). At no time was the FAA or the NTSB prejudiced by the delay in filing. On July 30, 1991, the NTSB issued Order EA-3359 (App. B), which was the subject of the Petition for Review filed with the Fifth Circuit.

Following the issuance of NTSB Order EA-3359, Beavers filed and perfected a timely appeal to the Fifth Circuit. The Court of Appeals, without argument, affirmed the action taken by the NTSB, which denied Beavers' motion to accept a late filed brief; denied his motion for an extension of time in which to file a brief; and, granting FAA's motion, dismissed Beavers' appeal.

REASONS FOR GRANTING THE WRIT

The standard for review of the NTSB's action in the instant case is based upon Section 706(2) of the Administrative Procedures Act. 5 U.S.C. 706(2). As part of its inquiry, the Fifth Circuit was asked to determine whether the NTSB's decision was based on a consideration of all relevant factors, and whether there had been a clear error of judgment. *PPG Industries, Inc., v. Harrison,* 587 F.2d 237 (5th Cir. 1979); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Both the NTSB, and the Fifth Circuit, have failed to take into account an extremely relevant factor; that the only party prejudiced by the untimely filing of a request for an extension of time before the expiration of the date for filing an appeal brief was Beavers. Failure to do so was an error in judgment.

In 1988, an unfortunate thing happened for the NTSB and those involved in its procedures. The Court of Appeals for the District of Columbia decided the case of *Hooper v. NTSB,* 841 F.2d 1150 (D.C. Cir. 1988). Simply put, *Hooper* told the NTSB that it had to be consistent in its grant of waivers permitting acceptance of late filed appeal briefs. In an effort to be consistent, the NTSB established a "good cause" requirement for waiving its rules regarding time for filing appeal briefs. *McArtor v. Hooper,* EA-2781 (1988). In doing so, however, the NTSB reacted in such a way as to deprive itself of the flexibility innate and required of administrative proceedings. It had found that not only must "good cause" be shown, the showing itself must be made before the deadline for the filing. By so ruling, the NTSB has stripped itself of its ability to waive its filing rules in cases, such as the instant one, wherein the motion for extension is made a day late, even if good cause is shown. The Fifth Circuit approved this rationale, ignoring as well the native essence of the administrative process; flexibility, and the importance of keeping a participant in the process from undue prejudice. See *K. Whiskey Store v. Shearen,* 276 S.W. 2d 457 (Ky. 1955).

Those who opposed the insistent growth of administrative agencies and their processes were and have been firm in their conviction that the "rule of law" must be applied to administrative procedures, and the "rule of law" must prevail. Congress and this Court have taken

the reverse position, stating that the validity of the administrative process is dependent on flexibility, discretion, and open inquiry. The strict application of the "rule of law" would inhibit the achieving of those benefits of the administrative process. See *Ward v. Scott,* 11 N.J. 117, 93 A.2d 385 (1952); *U.S. v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207 (1946).

NTSB has decided itself into a static corner, and in doing so, has created a circumstance belying its mandate. It has also failed to take into account the most relevant factor before it in consideration of the instant matter; neither the FAA nor NTSB suffered an iota of prejudice as a result the failure to timely file a request for an extension.

The Court should grant this writ as a method of re-establishing fundamental guidelines for agencies and those courts reviewing their activities. Their objective is and should be to safeguard basic constitutional rights, while permitting flexible investigation, inquiry, and determination. Decisions should be on the merits, not based on strict construction of some procedural rule. *NLRB v. Monsanto Chemical Co.,* 205 F.2d 763 (8th Cir., 1953). For the process to achieve the full measure of its intended stature, all steps should be taken to avoid prejudice to any of its participants.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 7, 1992

CERTIFICATE OF SERVICE

This is to certify that on this 7th of May, 1992, a copy of the aforegoing Petition for Writ of Certiorari in the matter of *Beavers v. NTSB and FAA* was sent by certified mail, return receipt requested, to:

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Robert D. Powell

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-4728
Summary Calendar

FRED W. BEAVERS,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD and ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION,

Respondents.

Petition for Review of an Order
of the National Transportation Safety Board

(February 14, 1992)

Before POLITZ, Chief Judge, KING and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Fred Beavers petitions for review of a decision of the National Transportation Safety Board (NTSB or Board) dismissing his appeal as untimely filed. We deny the petition.

I. *BACKGROUND*

On August 14, 1990, the Administrator of the Federal Aviation Administration (FAA) issued an order suspending Beavers's airman certificate for sixty days, pursuant to 49 U.S.C. app. § 1429(a) and 49 U.S.C. § 106(g). The order charged Beavers with various violations of Federal Aviation Regulations. Beavers appealed the FAA's order of suspension to the NTSB, whereupon the NTSB filed an administrative complaint against Beavers. Beavers answered the complaint and a hearing was set for March 26, 1991, before an Administrative Law Judge. Following the hearing, the ALJ rendered an oral decision and order[1] in favor of the Administrator. He noted that either party could appeal "today's decision" by filing a notice of appeal with the NTSB within ten days and filing an appeal brief within fifty days. Beavers's counsel indicated at the close of the hearing that he intended to appeal the oral decision. Beavers filed a notice of appeal two days later on March 28.

On May 20, 1991, 55 days after the ALJ's oral decision, Beavers, through counsel, filed a motion for extension of time to file an appeal brief. He represented that neither the ALJ's office, his counsel, nor the FAA had yet received a copy of the hearing transcript or of the excerpts that contained the ALJ's order. He further rep-

[1] Under the NTSB's Rules of Practice, an ALJ may render a decision either orally at the close of a hearing or in writing at a later time. 49 C.F.R. § 821.42(a).

resented that without the transcript and order, it was impossible to file an appeal brief. He stated that the FAA's counsel had been contacted and had agreed to an extension of 30 days within which to file the brief. On May 31, the FAA filed an opposition to the motion, as well as a motion to dismiss Beavers's appeal as untimely. The FAA's counsel stated that he had agreed to the extension of time by telephone on May 20 because Beavers's counsel had represented that the brief was due "this week." The FAA's counsel further stated that he had not been aware that the due date for Beavers's appeal brief was actually May 15, five days before Beavers's counsel had requested the extension of time.

On June 6, Beavers's counsel filed a "Rejoinder to Administrator's Opposition to Motion for Extension." In it, he stated that his miscalculation of the due date for the appeal brief was due to his wife's and his own illnesses in May, as well as his need to care for his young children. On June 7, Beavers filed his appeal brief, along with a motion to accept it as late-filed. The FAA responded to the motion on June 24. In an order dated July 30, the Board granted the FAA's motion to dismiss Beavers's appeal as untimely filed. The Board rejected Beavers's argument that nonreceipt of the hearing transcript was a basis for accepting a late-filed brief, stating that the Board has repeatedly ruled that this is an acceptable excuse for a late-filed brief only when an extension request was filed before the brief was due. The Board also rejected Beavers's counsel's reasons for filing the motion for extension of time late. The Board pointed out that counsel's excuses were not good cause for miscalculating the deadline. First, "any difficulty counsel may have encountered in May in correctly computing the due date does not explain or excuse his not having made that

determination immediately following or soon after the hearing in March." Second, the Board considered non-receipt of the transcript entirely unrelated to counsel's ability to calculate the due date of the brief. Finally, the Board concluded that "[i] nasmuch as respondent has not identified any reason establishing good cause for his failure to file a timely extension request, his appeal will be dismissed on the Administrator's motion." (footnote omitted). Beavers filed a timely petition in this court for review of the Board's order.[2]

II. *ANALYSIS*

We review a final order of an administrative agency to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence." Administrative Procedure Act § 706(2)(A), 5 U.S.C. § 706(2)(A), (E); *Tearney v. National Transp. Safety Bd.*, 868 F.2d 1451, 1453, (5th Cir.), *cert. denied*, 493 U.S. 937 (1989).

Beavers raises two basic arguments. First, he contends that the Board's decision was arbitrary and capricious because it replaced a previously announced "good cause" standard for allowing late-filed motions for extension of time with a standard under which it would not consider valid *any* reason for filing a motion for extension of time late. Beavers argues that *Hooper v. NTSB*, 841 F.2d 1150 (D.C. Cir. 1988) (per curiam), mandates application of a good cause standard when a motion for extension of time is filed late. In *Hooper*, the D.C. Circuit was concerned with the NTSB's policy on accepting late-filed appeal briefs. The NTSB had rejected petitioner Hooper's brief because it was filed five days late, explaining that it

[2] Jurisdiction is founded on 49 U.S.C. app. §§ 1486(a) and 1903(d).

would adhere to its policy of accepting late-filed briefs only upon a showing of good cause. However, the NTSB represented in its brief to the D.C. Circuit that it occasionally departed from its policy and accepted late-filed briefs without a showing of good cause. The court, citing the principle that "an agency's failure to enforce such a procedural rule uniformly is arbitrary and capricious," *id.* at 1151 (citing *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 237-39 (D.C. Cir. 1985)), granted the petition for review and remanded for further proceedings. In a concluding footnote, the court made clear that it was not directing the use of any particular procedures, but was merely requiring that the procedures the agency chose be applied in an evenhanded manner.

On remand, the Board issued an order in which it clarified its policy on late filings. The Board stated that it "intends to adhere uniformly to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs *or timely extension requests to submit those documents* have not been filed." *Administrator v. Hooper*, NTSB Order No. EA-2781 (Aug. 5, 1988). Beavers suggests that the Board applies the good cause standard to determine whether to accept late-filed appeal briefs, but *never* accepts late-filed motions for extension of time. This argument is belied by the language of the Board's final order. Examining the Board's decision in the instant case, it is apparent that it considered whether Beavers had shown good cause for the untimely filing of the motion for extension of time. In footnote 4 of its final order, the Board explained why it did not consider counsel's excuse a valid one. In the final sentence of the order, the Board stated that it would dismiss the appeal because "respondent has not identified any reason establishing good cause

for his failure to file a timely extension request. . . ." And in footnote 5, the Board gave an additional explanation of why it considered counsel's reasons insufficient to meet the good cause standard. Thus, the Board applied the standard it announced in its decision on remand in *Hooper*, and Beavers cannot complain of procedural irregularity.[3] It is immaterial that the Board never finds good cause when the error is due to a miscalculation; this merely represents a uniform policy as to what constitutes good cause, but does not indicate that the Board is not uniformly applying the good cause standard.

Beavers next contends that the Board has applied the good cause standard to allow an untimely filed motion for extension of time in a case factually indistinguishable from the present one. Were the Board to have done so, we might find the Board's application of its procedures arbitrary and capricious. Beavers directs our attention to *Administrator v. Hordon*, NTSB Docket No. SE-11048 (Letter from NTSB to counsel for Hordon, May 2, 1991), in which the Board accepted a late-filed motion for extension of time, and argues that the circumstances that led the Board to find good cause are identical to those existing here. In *Hordon*, the respondent's counsel was absent from his office for an extended period of time due to an illness, and he instructed a paralegal in his office to file a timely motion for extension of time to file a reply brief. When counsel returned to his office, he discovered that the paralegal had failed to follow his instructions. The FAA contends, and we agree, that the circumstances in *Hordon* are not so similar to the circumstances in this

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[3] The Board adhered to its policy of accepting late-filed motions for extension of time upon a showing of good cause in *Administrator v. Uhre*, NTSB Order No. EA-2903 (Feb. 22, 1989).

case that the Board's failure to find good cause here was arbitrary and capricious.

In *Hordon*, the error of a clerical employee was the sole reason asserted for the late filing of the motion. The Board has indicated that it has "accepted clerical error in the performance of a properly delegated task by an employee of a respondent's attorney as a ground for excusing 'a procedural default of minor proportions.' " *Administrator v. Boardman*, NTSB Order No. EA-2818 (Nov. 9, 1988) (citing *Administrator v. Akin*, NTSB Order No. EA-2376 (Aug. 11, 1986)). Here, however, the error was not that of a clerical employee who failed to file on time, but a miscalculation of the 50 day period. The Board's order amply explains why it thought Beavers did not show good cause. The illnesses with which counsel was burdened, as well as his family responsibilities, did not prevent him from calculating the 50 day period. In any event, counsel indicated that the illnesses occupied his time in May, long after the ALJ's decision. Counsel was admonished at the hearing before the ALJ of the time for filing a notice of appeal and perfecting the appeal, and there is no suggestion that he was unable in March to figure out the due date of the appeal brief. The fact that the hearing transcript was not available could not have had an effect on his ability to calculate the due date. Although Beavers strenuously argues that accepting the late-filed motion for extension of time will not prejudice the FAA, the Board does not appear to have taken prejudice into account in formulating the notion of "good cause" in the case of miscalculated periods of time. We cannot say that the Board's application of its good cause standard in this case was arbitrary or capricious, and therefore deny the petition for review.

PETITION FOR REVIEW DENIED.

APPENDIX B

SERVED: July 30, 1991
NTSB Order No. EA-3359

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C.

Adopted by the
NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of July, 1991

Docket SE-11307

JAMES B. BUSEY, Administrator,
Federal Aviation Administration,

Complainant,

v.

FRED W. BEAVERS,

Respondent.

ORDER DISMISSING APPEAL

The Administrator has moved to dismiss the appeal filed in this proceeding because it was not, as required by Section 821.48(a) of the Board's Rules of Practice

(49 CFR Part 821),[1] perfected by the filing of an appeal brief by May 15, 1991, that is, within 50 days after the law judge rendered an oral initial decision on March 26.[2] We will grant the motion to dismiss.

The Administrator's motion to dismiss was prompted by a motion respondent, by counsel, filed on May 20, 1991 for a 30-day extension of time to file his appeal brief, already five days late.[3] An extension was necessary, respondent indicated, because a transcript of the hearing needed to prepare the brief had not yet been received. However, as the Administrator's motion to dismiss points out, citing *Administrator v. Van Sickle*, NTSB Order No. EA-2410 (1986), the Board has repeatedly ruled "that nonreceipt of the hearing transcript provides good cause for extending the briefing deadline only in those instances

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[1] Section 821.48(a) provides as follows:

"§821.48 *Briefs and oral argument.*

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief."

[2] The law judge affirmed an order of the Administrator suspending respondent's Airline Transport Pilot certificate for 60 days for his alleged violation of sections 91.87(h), 91.75(b) and 91.9 of the Federal Aviation Regulations. Service of the 60 day suspension was waived as a result of respondent's timely filing, under the Aviation Safety Reporting System, of a NASA report concerning the operation which gave rise to the charges.

[3] On June 7, 1991, respondent filed an appeal brief along with a motion to have it accepted out of time.

where an extension request was submitted before the brief was due." Respondent's answer to the motion to dismiss does not demonstrate any basis for departing from such precedent.[4]

Inasmuch as respondent has not identified any reason establishing good cause for his failure to file a timely extension request, his appeal will be dismissed on the Administrator's motion.[5] *See Administrator v. Hooper*, NTSB Order EA-2781 (1988).

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[4] In his "Rejoinder to Administrator's Opposition to Motion for Extension," respondent's counsel cites various personal and professional distractions and stresses that he experienced during the month of May that assertedly contributed to the miscalculation of the brief's due date. Assuming, *arguendo*, that the various factors cited by respondent's counsel, including his wife's and his own poor health in May, are in some measure responsible for a mathematical error in determining when the brief should have been filed, dismissal for lateness of the filing would still be warranted. Apart from the fact that the Board has rejected such miscalculations as showing good cause, *see, e.g., Administrator v. Royal American Airways Inc.*, NTSB Order No. EA-2316 (1986), any difficulty counsel may have encountered in May in correctly computing the due date does not explain or excuse his not having made that determination immediately following or soon after the hearing in March.

[5] Counsel for respondent's suggestion that the deadline was missed because neither the transcript nor an excerpt from it containing the initial decision had as yet been received provides no justification for the procedural default. His reliance on the receipt of those documents as a "triggering mechanism" for filing the brief does not excuse the disregard of a rule establishing a time limit unrelated to the provision of the transcript to the parties. Moreover, it does not appear that such a reminder was necessary in this instance in view of counsel's assertion that he, in May, miscalculated the brief's due date.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's "Motion to Accept Late Filed Brief" is denied,

2. The Administrator's motion to dismiss is granted, and

3. The respondent's appeal is dismissed.

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

James D. Busey,
Administrator, FAA

Complainant

v.

Fred W. Beavers,

Respondent

REJOINDER TO REPLY TO MOTION TO ACCEPT LATE-FILED BRIEF

Comes now Respondent, by counsel, and submits the above referenced pleading.

1. The Administrator submits that neither the underlying merits of the case, nor the lack of prejudice to any party, are simply not relevant to the board's consideration of the motions before it. This is simply not accurate.

2. Whether prejudice would occur to a party is always a relevant consideration. In the instant case, not only was a transcript delayed, but a copy of the ALJ's order, as required by Rule 821.42 (d), was never served. If there would be prejudice to any party in this situation, it would be to Respondent. There simply has not been a

case like this one before the Board in its history. There has been ample showing of good cause, coupled with a failure to the Board's Office of ALJ's to comply with the Board's procedural rules. The juxtaposition of events and circumstances herein are special enough to warrant the grant of the subject motions. Indeed, that the Respondent's brief was filed *before the date to which an extension would have granted* is ample evidence that no prejudice has accrued to any party.

3. If the Board would like medical affidavits concerning the status of counsel's health, and his wife's condition, these can be supplied.

4. Respondent's motion for extension contained a significant amount of information concerning the merits of the case in an effort to demonstrate that the matter sought to be appealed was substantial, with significant issue. This is the sort of case that the Board might well have sought to review *sua sponte* under Rule 821.43.

5. A rule or policy which permits extensions in limited circumstances, only upon a showing of good cause, must have the flexibility to permit the establishment of good cause. "Good cause" can be one circumstance, or a series of circumstances, as presented here. There is simply no reason under these circumstances for being rigid when the policy under discussion permits some flexibility. This is an administrative proceeding, where the public interest does require an element of flexibility, especially where important constitutional rights are at issue. In the presence of showing of "good cause," the public interest and safety in Air Commerce would no doubt be pertainent had the Administrator failed to file a timely appeal brief. The Board should exercise its discretion in favor of Respondent in a case like this one before it, especially since

some of the Board's own Rules were inadvertently not complied with by the Board's Office of ALJ's.

6. Respondent would have no objection to the Administrator's being given as much time as is required for filing of a response to Respondent's brief.

Wherefore, it is respectfully requested that Respondent's motions for an extension of time, and for leave to file a late-filed appeal brief, be granted, with an adequate time granted the FAA for a response.

Respectfully Submitted,

/s/ Robert D. Powell
Robert D. Powell
Attorney for Fred W. Beavers
P.O. Box 33699
Wash. D. C. 20033-0699
(202) 223-5140

CERTIFICATE OF SERVICE

This is to certify that on this 26th day of June, 1991, a copy of the Rejoinder to Reply to Motion to Accept Late-Filed Brief of Fred W. Beavers was sent by certified mail, return receipt requested, to:

Office of the Chief Counsel
Peter Lynch, Esquire
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D. C. 20591

/s/ Robert D. Powell
Robert D. Powell, Esquire
P.O. Box 33699
Washington, D. C. 20033-0699
202-223-5140

Law Offices of
Robert D. Powell, P. C.
2033 M St., NW, Ste. 703
Washington, D. C. 20036

APPENDIX D

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

JAMES B. BUSEY, Administrator,
Federal Aviation Administration,

Complainant,

vs.

FRED W. BEAVERS,

Respondent.

REPLY TO MOTION TO ACCEPT LATE-FILED APPEAL BRIEF AND MOTION FOR EXTENSION OF TIME

Pursuant to section 821.14 of the Board's Rules of Practice, the Administrator of the Federal Aviation Administration (FAA) files his reply to Respondent's motion to accept late-filed appeal brief and his own motion for extension of time to file a reply brief, and states as follows:

1. On May 20, 1991, Respondent filed a motion for an extension of time to file his appeal brief in this matter. The brief had been due for filing on May 15, 1991.

2. On May 31, 1991, the Administrator filed his opposition to Respondent's motion. The Administrator based his opposition on the fact that Respondent had advanced

no good cause for his failure to make a timely request for extension. Relying on the Board's policy in *Administrator v. Hooper*, NTSB Order No. EA-2781 (1988), the Administrator also moved to dismiss Respondent's appeal.

3. On June 6, 1991, Respondent filed his rejoinder to the Administrator's opposition. In that rejoinder, Respondent advanced for the first time what he asserted is good cause for his failure to make a timely request for an extension. On June 7, 1991, Respondent filed his motion to accept the brief along with his brief. The motion incorporated the rejoinder.

4. Counsel for Respondent cites several reasons which he contends constitute good cause for his miscalculation of the appeal brief's due date and thus, apparently, his failure to timely request an extension. The first is the many distractions of a busy lawyer, including the filing of a writ for extraordinary relief in the U.S. Supreme Court on May 17, 1991. The distractions of a busy practice simply does not constitute good cause for Respondent's failure; if it did, the Board might as well abandon the strict enforcement of filing deadlines set forth in *Hooper*. Most attorneys could easily make this claim whenever a filing deadline is missed.

A major distraction cited by Respondent's counsel was the life-threatening illness of his wife and the need to care for his children during the first three weeks of May. There is no doubt that this reason strikes a chord of sympathy in any person. Finding this to be good cause, however, could be opening up a Pandora's box. What level of tragic situation rises to the level of distraction sufficient to excuse a procedural default? If counsel was able to conduct some business during this period, as he evidently was, should his failure in this case be excused?

Petitioner's own medical condition is another reason advanced. Should the Board accept this explanation, it could be setting a precedent which would be subject to abuse by any counsel desperate for an excuse. Should the Board require some kind of doctor's verification that a medical condition caused or significantly contributed to a deadline's miscalculation? If an ongoing condition provides an excuse on one occasion, does this set a precedent for the attorney in the future?[1]

5 5. Respondent goes into some detail in describing the merits of his appeal, suggesting that this should persuade the Board that it should allow him to file a brief. In fact, the merits of the appeal are at this time irrelevant. Similarly, Respondent's assertion that no one will be prejudiced by the granting of his motion is beside the point. The relevant standard governing requests of this type is good cause, not a showing of no prejudice. Finally, the fact that respondent did not have the transcript does not establish good cause for Respondent's failure to make a timely request for extension. *Administrator v. Van Sickle*, NTSB Order No. EA-2410 (1986).

---

[1] We are aware of one case in which an attorney's illness was a part of the basis for a late-filed request for extension of time to file a reply brief which was granted. *See, Administrator v. Hordon*, NTSB Docket No. SE-11048. (A copy of counsel's motion and the General Counsel's ruling is attached.) First, under its language, *Hooper* does not apply to reply briefs or request for extension of time therefor. Moreover, *Hordon* differs from the instant case because although, according to his motion, illness explained counsel's absence from his office, he had instructed his paralegal to file a motion for extension with the Board and he did not learn of the paralegal's failure to do so until it was too late. In *Hordon*, the situation described bore some similarity to *Administrator v. Akin*, NTSB Order No. EA-2376 (1986), in which a late filing was excused because a secretary failed to follow an instruction to file a brief.

6. The Board has consistently applied the *Hooper* standard and has found good cause in very limited circumstances. *See, e.g., Administrator v. Boardman*, NTSB Order No. EA-2818 (1988); *Administrator v. Pinto*, NTSB Order No. EA-3160 (1990). The Board has rejected miscalculation of the due date as good cause. *Administrator v. Uhre*, NTSB Order No. EA-2903 (1989). The question presented in this case is whether the underlying circumstances, *i.e.*, the distractions which counsel asserts gave rise to the miscalculation, distinguish this case from others to such an extent that the Board should find good cause. This is admittedly a difficult policy question for the Board to answer and the Administrator has attempted to raise concerns for the Board's consideration.

7. Respondent has filed an appeal brief, dated June 7, 1991, along with his motion. Accordingly, a reply brief by the Administrator would be due by July 8, 1991. *See* 49 C.F.R. § § 821.48 and 821.10.

9. If the Board denies Respondent's motion to accept late-filed appeal brief, no reply brief from the Administrator will be necessary. Accordingly, in order to avoid a useless expenditure of resources, and to the extent that an extension request is even necessary, the Administrator hereby requests an extension of time until 30 days from the disposition of Respondent's motion in order to file his reply brief, should one become necessary.

Respectfully submitted,

/s/ Peter J. Lynch
Manager, Enforcement Proceedings
Branch, AGC-250
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591
(202) 267-9956

Dated: June 24, 1991

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by U.S. mail, postage prepaid, certified return-receipt requested, a copy of the Administrator's Reply to Respondent's Motion to Accept Late-Filed Appeal Brief and Motion for Extension of Time Brief in the case of *Administrator v. Fred W. Beavers*, Docket No. SE-11307, addressed to:

Fred W. Beavers
200 Meadow Brook
San Antonio TX 78232

Robert D. Powell, Esq.
Post Office Box 33699
Washington, DC 20033-0699

In addition, I hereby certify that on this date I have sent by U.S. mail the original and four copies of the foregoing document to:

Office of the General Counsel
National Transportation Safety Board
Room 818
800 Independence Avenue, S.W.
Washington, D.C. 20594

/s/ SKL

Dated: June 24, 1991

NATIONAL TRANSPORTATION SAFETY BOARD
Washington, D.C. 20594
Office of the General Counsel

[Seal]

May 2, 1991

Timothy J. Healey, Esquire
Healey & Stewart
Westwood Business Centre
690 Canton Street
Westwood, Massachusetts 02090-2322

Re: *Administrator v. Hordon*
Docket SE-11048

Dear Mr. Healey:

Your unopposed motion for an extension of time to file respondent's reply brief out of time is hereby granted for good cause shown. Respondent's reply brief will be due for filing on or before May 31, 1991.

Sincerely,

/s/ Daniel D. Campbell
Daniel D. Campbell
General Counsel

cc: James A. Barry, Esq.

HEALEY & STEWART
Attorneys at Law

Westwood Business Centre
690 Canton Street
Westwood Massachusetts 02090-2322
(617) 326-8008
FAX: (617) 329-9597

April 3, 1991

Office of the General Counsel
National Transportation Safety Board
Room 818
800 Independence Avenue, S. W.
Washington, D.C. 20594

RE: Administrator, FAA
VS: Richard D. Hordon (SE-11048)

Dear Sir/Madam:

In reference to the above-captioned matter, enclosed please find the original and four copies of Respondent's Motion for Extension of Time to File Reply Brief.

Thank you for your assistance with this matter.

Very truly yours,

/s/ Timothy J. Healey/KTR
Timothy J. Healey

TJH/ktr
Encs.

VIA Certified Mail (RRR) No.: 332 035 106
cc (w/enc.): James A. Barry
VIA Certified Mail (RRR) No.: 332 035 107

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

DOCKET NO.: SE-11048

In the Matter of:

JAMES B. BUSEY, Administrator,
Federal Aviation Administration,

Complainant,

v.

RICHARD DEAN HORDON,

Respondent.

RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF

Respondent, by his counsel, hereby moves for an extension of time to file a Reply Brief to April 30, 1991, and as good cause therefore, states as follows:

The Administrator through its counsel agreed by stipulation to extend Respondent's time to file his Reply brief to January 31, 1991. For reasons stated below this stipulation was not presented to the Board via Motion, and thus Respondent's time to file has expired.

Mindful of the Board's policy as expressed in *Administrator v. Hooper* ES-2781 (1988), Respondent's counsel states as good cause for the allowance of this Motion the following:

On October 12, 1990 counsel for Respondent was diagnosed as having colon cancer, and was hospitalized from December 3-9, 1990 for surgery. Liver cancer was found during the surgery, and counsel was again hospitalized for a second surgery from February 7-16, 1991. At home convalescence continues to date, but on April 1, 1991 I visited my office and learned for the first time that contrary to my instructions to my paralegal in my absence, no motion for an extension of time in this matter had been presented to the Board.

Thus, although counsel for Respondent remains individually responsible for this oversight, under the hardship created by the medical circumstances previously stated, it is respectfully suggested that the extreme personal hardship of counsel which created this oversight constitutes good cause for the allowance of this Motion.

Counsel for the Administrator does not oppose this Motion.

Respectfully submitted,

/s/ Timothy J. Healey/KTR
HEALEY & STEWART
690 Canton Street
Westwood, Massachusetts 02090
617/326-8008

DATED: April 3, 1991

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of April, 1991, the original and four copies of the foregoing was mailed

via certified (return-receipt requested), postage prepaid mail to the following:

Office of the General Counsel
National Transportation Safety Board
Room 818
800 Independence Avenue, S.W.
Washington, D.C. 20594

and that a copy of the foregoing was mailed via certified (return-receipt requested), postage prepaid mail to the following:

James A. Barry
Enforcement Proceedings Branch, AGC-250
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, D.C. 20591

/s/ Timothy J. Healey/KTR
Timothy J. Healey

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

James D. Busey,
Administrator, FAA,

Complainant

v.

Fred W. Beavers,

Respondent

MOTION TO ACCEPT
LATE FILED BRIEF

Comes now Respondent, through counsel, and moves this Honorable Board for its permission to file the Appeal Brief in the captioned case. In support whereof, the following is submitted:

1. Respondent incorporates by reference the entirety of his motion for an extension of time to file a brief, and rejoinder to the Administrator's opposition to said motion, as well as Respondent's opposition to Administrator's motion to dismiss.

2. Further, it should be brought to the Board's attention that, in addition to not having received a transcript of the hearing in the instant case until June 3, 1991, Re-

spondent has never received an excerpted copy of the ALJ's oral decision from the transcript, as provided for in Board Rule 821.42(d). Had it been served, along with the transcript, the triggering mechanisms for timely motions or filing of the brief itself would have been in place.

3. Finally, this brief is being proffered for filing in advance of any continuance the Baord would have established had the motion for extension been made of May 15, 1991. There is clearly no prejudice to any party in accepting this brief and continuing on with the appeal. From the content of the brief, as synopsized by Respondent in the pleading incorporated by reference, a dismissal of this appeal would be extremely prejudicial to Respondent. Serious constitutional issues have been alluded to by Respondent, and they require attention.

Respectfully Submitted,

/s/ Robert D. Powell
Robert D. Powell
Attorney for
Fred W. Beavers
P. O. Box 33699
Wash. D. C. 20033-0699
(202) 223-5140

Law Offices of Robert D. Powell
2033 M St. NW, Ste. 703
Washington, D. C. 20036
June 7, 1991

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of June, 1991, a copy of the Motion to Accept Late Filed Brief of Fred W. Beavers was sent by certified mail, return receipt requested, to:

Office of the Chief Counsel
Peter Lynch, Esquire
Federal Aviation Administration
800 Independence Ave., S. W.
Washington, D. C. 20591

/s/ Robert D. Powell
Robert D. Powell, Esquire
P. O. Box 33699
Washington, D. C. 20033-0699
202-223-5140

Law Offices of
Robert D. Powell, P. C.
2033 M St., NW, Ste. 703
Washington, D. C. 20036

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

James D. Busey
Administrator, FAA

Complainant

v.

Fred W. Beavers

Respondent

BRIEF ON APPEAL

Comes now Respondent, Fred W. Beavers, and files this Brief on Appeal in the above captioned case.

In support whereof, the following is submitted.

STATEMENT OF THE CASE

This case is before the Board by virtue of Respondent's appeal of the Initial Decision of ALJ William E. Fowler. The Initial Decision was issued orally by Judge Fowler on March 26, 1991, after hearing.

This case came before the ALJ based upon a series of allegations allegedly taking place on October 27, 1987, at about 5:17 P.M. at the Philadelphia International Airport.

The unrebutted testimony is that weather conditions at that time at the airport were a ceiling of 1,000 feet, overcast, with moderate rain, heavy at times, with standing water "in various places, on the runway, taxiways, aprons; everywhere" (Tr. 239). The sky was very dark due to multilayer clouds "all the way up to the mid 20,000 range" (Tr. 240).

After receiving landing instructions, Respondent and his co-pilot were issued instructions to taxi on taxiway AA to taxiway U, turn onto taxiway U; hold short of 9 Left at taxiway U. Because of the weather conditions, and a failure in the taxiway lighting (Tr. 243, 275), Respondent passed the intersection of AA and U, and having immediately realized that taxiway U had been passed, executed a 180 turn (Tr. 244, 267). The aircraft operated, a Cessna Citation 500, can "turn on a dime" (Tr. 270). Taxiway U was located quickly (Tr. 274), and Respondent turned on to it, noting that the taxiway sign was not properly functioning (Tr. 243, 275). While Respondent was into the 180 degree turn, Controller Tisdall instructed Respondent to "clear the runway" (Tr. 271). Respondent was never on the runway, as alleged by the Administrator's complaint, inasmuch as both Respondent and his co-pilot, Bradley Smith, acknowledged seeing the runway lights for the runway in question, 17-35, and both pilots categorically deny encroaching on the runway (Tr. 241, 271-272).

By way of admissions both in testimony and during discovery, the Administrator or his witnesses admitted that the pilots in the aircraft were in a better position to judge their position vis a vis hold short lines or position on the airport relative to the intersection of taxiway AA and Runway 17-35, than Tower Personnel (Tr. 141, Response to Interrogatories, Response No. 18).

After Respondent had turned onto taxiway U, he was instructed to follow another aircraft, and call a specific telephone number (Tr. 247). Respondent spoke to a Mr. Reichenback, a watch supervisor, at the tower, and told this FAA employee that he did not enter onto runway 17-35, and that they had missed the taxiway marker at the intersection of taxiways AA and U, as the sign was either unlit or very dimly lit (Tr. 247). No taped record of this conversation was saved by the Administrator (Tr. 21). The Inspector in charge, Mr. Elkan, never spoke with Mr. Reichenback, although he knew a call had been made from his review of the ATC tape (Tr. 179-181). In fact, Respondent complained twice to the tower about the lighting at that intersection on the evening in question. (Tr. 244-245).

Prior to proceeding to hearing, substantial discovery was undertaken. Respondent filed, and the Administrator responded to, eighteen discrete questions, seeking either written response, or production of documents. The Administrator's responses came in an initial response of March 8, 1991, and was supplemented on March 21, 1991, received by counsel of March 22, 1991.

In pertainent part, on March 8, 1991, a witness list was provided by the Administrator. It did not include the name of one of the witnesses produced by the Administrator at hearing, Bohdan M. Korzeniowski (Tr. 33). Mr. Korzeniowski's testimony was important to the Administrator's case, for in addition to its content, he sponsored Exhibits A-1, an airport blueprint and lighting plan, and A-2, an aerial photograph of the airport, neither of which had been produced in accordance with Respondent's discovery requests, and were seen by Respondent for the first time the day of the hearing. (See Administrator's Discovery Response, March 8, 1991, Responses 1, 3,

and 13). In fact, the only document produced in response to the discovery request calling for an "airport blueprint" was a page from a Jeppeson chart (See Response 13).

Further, the Administrator failed to fully answer Discovery Request 14, which was, simply, "Identify all voices on the tape of the incident that is the subject of the instant action." The Administrator, in Response 14, identified the voice of Controller Tisdall, and the pilot of GAA 812, but failed to identify a voice calling "stop the departures" heard on the tape. Yet, Controller Tisdall at the hearing had no problem identifying that voice (Tr. 74) as "Phil Panella," an FAA employee, a TRACON departure controller (Tr. 101). Identification of Mr. Panella's voice pre trial was required. Mr. Tisdall testified that he has been exclusively at the Philadelphia Tower since 1982. No reason was proffered why Mr. Panella's voice was identified as late as March 21, 1991, and at that point, not reported to Respondent's counsel (Tr. 75).

At hearing, Mr. Stephen Pulak, an FAA employee, testified as an eye-witness. Mr. Pulak admitted to having no recollection of the alleged incident in question (Tr. 158). He referred to a copy of a statement he believed he prepared at or shortly after October 27, 1987 (Exhibit A-7, Tr. 149-154). The Administrator could not produce the original (Tr. 148). The document was not produced in response to discovery (Tr. 147). It was handed to Respondent's counsel the morning of the hearing (Tr. 7-8). Mr. Pulak did not verbally testify that he saw Respondent pass a hold short line, enter the runway environment, or operate on runway 17-35. Administrator's Exhibit A-7, the only "evidence" from an "eye-witness" placing Respondent on runway 17-35 on October 27, 1987, a hearsay document representing an incident of which the "eye-witness" had no independent recall, was admitted

into evidence, over objection *in liminae* (Tr. 7-10), and over objection when proffered (Tr. 154).

FAA Inspector Elkan admitted never speaking with any controller involved with the subject incident (Tr. 184-185), speaking instead with other FAA employees, who may or may not have interviewed the controllers. The record is silent on that point. None of the FAA employees he spoke to, Quality Assurance personnel, were called as witnesses.

During the course of the alleged incident, a departure was aborted (Tr. 103). The pilot of the aircraft involved, a Beech 19, Bus Ex 812, may have been in a position to determine whether Respondent was on runway 17-35. Said pilot was not summoned as a witness by the Administrator.

Issues on Appeal

I. Did ALJ Fowler commit prejudicial multiple error, amounting to a denial of due process of law, by denying Respondent's motion *in liminae*, and objections to documents and testimony, thereby permitting the following to occur:

A) Allowing the introduction of Administrator's Exhibit 1 and 2 into evidence, inasmuch as they had been covered by a prior discovery request, and not made available until the morning of the hearing; and

B) allowing a witness not listed as a witness on a response to interrogatories to testify; and

C) Allowing the introduction into evidence (Administrator's Ex. 7) of a copy, not the original, of a statement of a witness, produced the morning of the hearing, despite a previous discovery request that called for its prior production; and

II. Did the ALJ violate Respondent's constitutional rights to due process of law in failing to provide a full and fair hearing and Initial Decision.

III. Did ALJ Fowler commit prejudicial error in denying Respondent's motion to dismiss at the close of the Administrator's case?

IV. Are ALJ Fowler's findings of fact supported by a preponderance of reliable, probative and substantiated evidence?

ARGUMENT

I. THE ALJ'S DECISION TO PERMIT THE INTRODUCITON OF ADMINISTRATOR'S EXHIBIT NO. 7 INTO EVIDENCE WAS PREJUDICIAL ERROR.

Stephen Pulak was called as a witness in the instant case (Tr. 142). He had been an Area Supervisor at the Philadelphia International Tower for ten and one-half years, and as such was on duty at said airport on October 27, 1987, at 5:17 P.M. (Tr. 142-143).

Mr. Pulak has no independent recollection of the subject incident (Tr. 158). When asked by the Respondent's counsel,

> Q. Do you have a recollection of this incident independent of the statement you signed? (Tr. 158),

the witness responded "No, sir" (Tr. 158). The witness was asked if he made a statement by the Administrator's counsel (Tr. 144). He did not recall making the statement itself.

> Q. Did you make a statement regarding the incident.
>
> A. Based on my statement, I did.

When asked if it were a personnel statement he wrote, (Tr. 145), he answered, "Appears to be" (Tr. 145).

The original of the statement could not be located, although the Administrator's counsel had the original of other documents at the hearing (Tr. 148).

Respondent's counsel saw the statement for the first time the day of the hearing, just prior to the commencement of trial (Tr. 147, 7-8), A motion *in liminae* was made as to the statement, and the ALJ decided to rule on each objection to each bit of evidence as it was presented. Respondent's objection to A-7 was overruled (Tr. 154), and Mr. Pulak's statement was admitted.

Taken by itself, this failure to make discovery and the product of the Administrator's recalcitrance, although extremely prejudiced, would not rise to the level of a deprivation of Respondent's due process rights "to an extent constituting reversible error," *Admin. vs. George R. Lewis*, 3 NTSB 1241 (1978). When coupled with the many other violations of discovery, *infra*, however, Respondent has been denied due process of law under the Fifth Amendment to the Constitution of the United States. The statment of the witness should not have been admitted into evidence because of discovery failure, and because of the arguments below.

Rule 612 of the Federal Rules of Evidence applied to the situation involving A-7. Its use to refresh Mr. Pulak's recollection would have been permissible. The problem was that Mr. Pulak had no recollection to refresh (Tr. 158). Before a document can be used for that purpose, the witnesses' recollection must be exhausted. *U.S. v. Lewes*, 406 F.2d 486 (CA 7 1969, *cert. den* 394 U.S. 1013, 89 S.Ct. 1630). Since Mr. Pulak never stated that his memory had been refreshed, and that he had no inde-

pendent recollection, the statement could not have been admitted for that purpose. *U.S. v. Cheyenne*, 558 F.2d 902 (CA 8, 1977). In fact, the writing cannot be moved into evidence by its user, only by the adversary. *U.S. v. Davis*, 551 F.2d 233 (CA 8, 1977).

Apart from his statement, Mr. Pulak never testified that he saw Respondent's aircraft on the runway. In a supplemental response to discovery of March 21, 1991, it is stated that Mr. Pulak visually observed Respondent's aircraft (Response 6(a) and (b)), but Mr. Pulak was said by the Administrator in the Discovery Response to be unable to state with particularity his recollection to 1) sky conditions, 2) the amount of daylight remaining; 3) whether Respondent's aircraft lights were on; or 4) whether any attempt was made by Mr. Pulak to locate the aircraft's position by virtue of its lights.

The ALJ's admission of a copy of the document, Administrator's Ex. 7, was violative of Rule 1003 of the Federal Rules of Evidence. A duplicate is admissible to the same extent as an original, unless a genuine question is raised as to the authenticity of the original. The ALJ could not make a determination as to the document as the original was not produced. The circumstances themselves raised questions. The witness's answers, as previously reported, were interestingly vague and non-commital. He had no recollection of the incident. His identification of the statement, A-7 -"it appears to be"- is cagey, as if he were unwilling to be identified with it. Not only did the copy appear the day of the hearing, it had not been surrendered during discovery, or during FOIA production (Tr. 149). Since the copy cannot be authenticiated, it may not be admitted under Section 803(8) of the Federal Rules of Evidence.

In sum, a major piece of evidence, as will be shown, the only evidence that exists placing Respondent's aircraft on Runway 17-35, on October 27, 1987, at 5:17 P.M., is flawed in the extreme. It should have been stricken. It's admission constitutes reversible error, and when coupled with the other evidentiary decisions of the ALJ, constitutes a denial of due process of law.

II. THE ALJ COMMITTED PREJUDICIAL ERROR IN ALLOWING THE INTRODUCTION INTO EVIDENCE OF ADMINISTRATOR'S EXHIBITS 1 AND 2.

Before the start of hearing, counsel for the Administrator notified Respondent that she intended to introduce into evidence an airport blueprint, and an aerial photo of the Philadelphia International Airport. These were shown to Counsel, and pinned to the wall, in full view of the ALJ and all present. The airport blueprint was marked as A-1; the photograph was marked as A-2. Neither document had been turned over to Respondent as part of answers to Discovery of March 8, 1991, or March 21, 1991 (Tr. 7). A motion was made *in liminae* with respect to the blueprint and the photo, and the ALJ reserved pending a specific objection at the time of offering.

A-1 was in existence on March 8, 1991, and March 21, 1991 (Tr. 36). An objection was made at the time of offering, and it was overruled (Tr. 38).

The failure to produce the document was prejudicial to Respondent's preparation. An interrogatory was posed, and responded to by the Administrator on March 8, 1991, calling for what turned out to be A-1. Instead of supplying A-1, the Administrator supplied Respondent's Exhibit No. 1, a page down from a Jeppeson Man-

ual, depicting the airport taxiway and runway configuration, and little else. A-1 had runway and taxiway lighting diagrams, and placement and coloration of runway and taxiway stripes.

A motion was made to strike all testimony concerning A-1 (Tr. 46), to which the ALJ responded by overruling the objection, seeing nothing injurious or prejudicial in the process.

The same procedure was followed with respect to A-2, and it was admitted over objection (Tr. 50).

The Admission of A-1 and A-2 were prejudicial to Respondent. They were not produced during discovery. The pattern of electrical lighting, and placement of edge lines, would have been helpful to Respondent, especially in cross-examinations of witnesses, and might have led to the presentation of rebuttal witnesses. It would have also been useful to have the blueprint particularly, inasmuch as the actual hold short lines at Runway 17-35 could have been placed there precisely.

By themselves, the admission of A-1 and A-2 do not amount to a deprivation of Respondent's rights to due process of law under the Fifth Amendment, but when coupled with the Admission of A-7 *supra*, and what was to come, the effect on Respondent was extremely prejudicial and constitutes reversible error.

III. THE ALJ COMMITTED PREJUDICIAL ERROR IN PERMITTING THE TESTIMONY OF BOHDAN M. KORZENIOWSKI.

On March 8, 1991, and March 21, 1991, the Administrator responded to discovery. One of the questions asked (Question 1) was "name your witnesses." The answer (Answer One, unsupplemented at any time) was

Mssrs. Tisdall, Elkan and Pulak. At no time, not even the day before hearing, did counsel for the Administrator mention that an additional witness was to be called, much less that he was going to sponsor two exhibits (A-1 and A-7) previously unknown through the discovery process, though available since 1986.

Likewise, Mr. Korzeniowski has been available at his job since 1969 (Tr. 34).

A motion was made *in liminae* to this witness testifying. It was overruled.

The ALJ, in permitting this witness to testify, added to the accumulating violation of Respondent's constitutional rights to fair play under the Fifth Amendment to the Constitution of the United States. The exclusion of the witness from the witness list totally disabled Respondent to prepare for his testimony. For the converse to this situation, see *Administrator v. Webber*, 3 NTSB 860 (1978). The Administrator's activity is directly in violation of the Board's instruction that parties be afforded full rights of discovery, so that all the requirements of due process of law may be met at each stage of the proceeding. *Admin v. McClain*, 1 NTSB 1542 (1972). Not only was Respondent handicapped by the unwarranted admission of A-7, A-1, A-2, and the permitted testimony of Mr. Korzeniowski, he was deprived due process, constituting reversible error. *Administrator v. Lewis*, 3 NTSB 1241 (1978).

IV. THE ALJ'S FAILURE TO COMPLY WITH BOARD RULE 821.42(B) IS A VIOLATION OF RESPONDENT'S RIGHTS TO DUE PROCESS OF LAW.

That the ALJ recognized that this case had a particular significance is highlighted by his interruption of the Ad-

ministrator's counsel, during her opening, as she was arguing her facts, by stating, "Thank God it was not another Sky West" (Tr. 25, lines 12 and 13).

While it would appear that, indeed, we should be thankful that there was no accident, the ALJ's remarks presumed that Respondent's aircraft was on the runway in question. This statement was made before any evidence was introduced.

Yet, as Respondent's counsel went through the litany of failed production, which included Administrator's Exhibits A-1, A-2, A-4, A-5, and A-7, the ALJ stated that he had not heard complaints about discovery as bad as the instant case (Tr. 17). He noted that there might be some prejudice to Respondent by permitting Mr. Korzeniowski to testify (Tr. 39) as to A-1. At one point (Tr. 46), the ALJ said "I will be cognizant throughout this entire proceeding as to whether or not your and your client's case has been prejudiced by the Administrator's *recalcitrance* here in complying with your previous and earlier requests." (Emphasis supplied).

During an argument involving the failure of Administrator to properly answer Discovery Request 14, the inability on the part of the Administrator to identify all the voices on the ATC tape containing the subject incident (A-4), the ALJ noted that the Administrator's conclusion that naming all the voices on the tape would not aid Respondent was erroneous (Tr. 76). A-4 was admitted, but an objection was noted that there was a failure of discovery compliance.

At one point, the Administrator's counsel criticizes her own discovery responses, calling her response "incorrect" (Tr. 96). Criticizing the discovery failures again, the ALJ stated:

> This is certainly one of the most extreme cases I have ever heard in that regard. . . Even if there is an appeal here and the case is remanded by the Board, we are back to square one technically where discovery is concerned (Tr. 152).

The ALJ stated that he was going to "bear that in mind all along during the course of this proceeding," implying it was a heavy burden the Administrator was going to bear.

Again, when A-7 was admitted, the ALJ indicated his displeasure with the Administrator, and stated:

> Let the record reflect that the admission of a statement does not mean it is afforded full weight and probative value because it is admitted. There are circumstances with which the record is replete, which would detract from the full probative value of some of the documents that have been admitted (Tr. 154).

But the ALJ not only gave full probative value to A-7, it was the only piece of evidence from an "eyewitness," as has been shown, placing Respondent's aircraft on the runway. It was used to overcome the testimony of Respondent and Bradley Smith, both conceded by the Administrator in his Discovery Response 18, and Mr. Tisdall to be in a superior position than Mr. Pulak to know where they were (Tr. 141).

The only conclusion that can be drawn from ALJ's behavior is that he was ruling on the evidentiary questions in such a way as to pass the record on to the Board. His remark previously cited, that should the case come back on remand, the discovery issues would still be a problem (Tr. 152), is a telling one. The only party who would seek to raise discovery issues would be Respondent. This statement was made mid-way through the testimony of Step-

hen Pulak before Respondent's case was on the record. It is submitted that the ALJ perceived this case, one involving the currently sensitive area of runway incursions, as a major problem because of the massive amount of discovery violations, and decided to deal with it as a case that required Board attention. The record was merely made.

The ALJ's decision on the motion to dismiss (Tr. 194) bespeaks of the same notion. His final decision, in which, as it will be shown, the ALJ literally manufactures three eyewitnesses, and then counts the only so-called real "eyewitness," without an independent recollection (Mr. Pulak) twice, to come up with five, only supports this argument (Tr. 321, 322). Moreover, the ALJ made no specific analysis of the evidence, and no credibility findings, both specifically called for in Rule 821.42(b).

On deciding to pass the case to the Board, the ALJ denied Respondent a full and fair hearing and a full and fairly stated initial decision in accordance with Board Rule 821.42(b). The Initial Decision (ID) is extremely brief, and as noted, miscalculates the number of so-called "eyewitnesses" by four. There is no attempt to analyze the evidence, or make detailed credibility findings. The Board is almost invited to exercise its power under its Rule 821.49, and substitute its judgement for the ALJ. While it is of course lawful in itself for the Board to substitute its judgement, such a process becomes a violation of Board rules and due process when necessary credibility findings are not made.

V. THE ALJ COMMITTED ERROR WHEN HE FAILED TO GRANT RESPONDENT'S MOTION TO DISMISS AT THE CLOSE OF THE ADMINISTRATOR'S CASE.

At the close of the Administrator's case, the evidence on the record consisted of Administrator's Exhibits 1-10, Respondent's Exhibits 1-3, and the testimony of Mr. Korzeniowski, Mr. Tisdall, Mr. Pulak, and Mr. Elkan.

Starting with Mr. Elkan, he admitted that he was not a witness to a runway incursion on October 27, 1987, at 5:17 P.M. (Tr. 182). He also admits that everything he knows about the incident is double, if not triple, hearsay. For example, he never spoke with the controllers themselves; he spoke only to Quality Assurance personnel (Tr. 184). With whom they spoke in connection with the allegations is unknown. He received a letter from Mr. Korzeniowski regarding the status of lighting at the intersection of taxiways AA and U (A-3), but this letter, itself hearsay, was based on something reported to Mr. Korzeniowski (Tr. 54). A-3 was admitted over objection. While admissible, even though hearsay, the weight afforded the evidence may be affected. In the instant case, the ALJ had before him A-9 and A-10, the letters of Respondent and his co-pilot, both of whom contend that the lights at the subject intersection were malfunctioning. Inasmuch as A-9 and A-10 are also hearsay, and the Administrator has the burden of proof, there should have been a finding in favor of Respondent at the time of the close of the Adminsitrator's case that the Administrator failed in carrying his burden of proof that the intersection lighting was operative. Indeed, Mr. Elkan, the person who was and did make the call with respect to the prosecution of the case, stated that the lighting issue was of importance to him (Tr. 163). He had no independent

knowledge of whether or not the subject lights were operative on the night in question (Tr. 178). Although Mr. Beavers reported the condition to the FAA's Mr. Reichenback (Tr. 247), Mr. Elkan made no effort to contact Mr. Reichenback (Tr. 179-182).

Mr. Reichenback was not called as a witness, nor were any Quality Assurance personnel.

Mr. Korzeniowski was not a witness to the event. The ALJ found that neither was Mr. Tisdall (Tr. 322), a finding that could only have been drawn from his testimony. The only live witness left upon whom the ALJ could rely in finding a prima-facie case was Mr. Pulak. Mr. Pulak never testified that he saw the incursion. Mr. Pulak's statement, though admitted by the Judge, carried the burden, the ALJ himself said, of not being entitled to full probative value.

Of the documentary evidence, the incident report, A-8, is of little value. Someone apparently signed it for Mr. Hurst. The person may be Mr. Welsh. We have no idea upon what Mr. Welsh relied in formulating A-8. We do know that Mr. Welsh was not at the hearing. We do not know if Mr. Welsh interviewed the controllers. It is likely that he did not. We know that Mr. Welsh was not a witness to the incident.

Neither A-1 nor A-2 contribute to the finding of a prima facie case having been reached. No person called by the FAA was able to place an accurate hold short line on A-1 or A-2.

A-6, Controller Tisdall's statement, was found not to be probative of this witness seeing the aircraft on runway 17-35 (Tr. 322). A-4 and A-5, the tape and transcript, are of no help in reaching the conclusion that a prima-facie case had been made out. With Controller Tisdall's

status as not being an actual witness to an incursion clear on the record, his statements on the tape are meaningless.

A-9 and A-10 refute the Administrator's case effectively, and they were admitted as part of his case. Not only is A-3 refuted, but every implication that Respondent was over a hold-line or on an active runway is refuted by A-9 and A-10.

The ALJ should have granted Respondent's motion to dismiss. His failure to do so was in error.

VI. THE ALJ'S DECISION IS NOT SUPPORTED BY A PREPONDERANCE OF RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE.

The Burden of Proof in the instant case, brought under Section 609 of the Federal Aviation Act of 1958, as amended, is upon the Administrator. To prevail, he must do so by a preponderance of the credible evidence. In finding for the Administrator, the ALJ must support his decision by a preponderance of the reliable, probative, and substantial evidence. Both the Administrator and the ALJ failed in their tasks.

Respondent has previously examined the evidence piecemeal in prior headings. Taking the case as a whole, the following emerges as clear.

Respondent landed at the Philadelphia International Airport, on October 27, 1987, at about 5:15 P.M. After being instructed to proceed on taxiway AA to taxiway U, he was to turn on to U, a left turn, and proceed to runway 9 L, and hold short of that runway (Tr. 90). The weather was very bad (Tr. 240).

The eyewitness testimony of Respondent and his co-pilot (Tr. 244), that the lights at the intersection of Taxi-

ways AA and U were either dimly lit or unlit has not been rebutted by credible testimony or evidence.

The Administrator's attempt at rebutting Mr. Smith and Respondent is A-3, and Mr. Korzeniowski. Issues of admissibility of the document and the testimony of the witness aside, rank hearsay, in the form of the witness' testimony, and his letter, are not enough to overcome the eyewitness and live testimony of two witnesses, absent a specific credibility finding by the ALJ that he disbelieved both Mr. Smith and Respondent on this issue. There is no such finding on the record or in the ALJ's decision.

Further, Respondent was told to call the tower, and he did (Tr. 247). Mr. Elkan had no reason to doubt that he did (Tr. 180). A witness, entirely within the control of the FAA, was available to refute Respondent's claim that he twice reported dimly lit or unlit lights at the subject intersection. This witness was not produced, nor was a tape of the conversation produced. As such, Respondent is entitled to an inference that the evidence would be favorable to him had it been produced under the missing witness or missing evidence rule.

> If a witness or a piece of evidence who or which could have given or provided material testimony or evidence on an issue is peculiarly available to one party, and was not called or produced by that party, than it is appropriate to infer that the testimony of the witness on the evidence would have been unfavorable to the party failing to call that witness or produce the evidence. See *Lowrey v. U.S.*, 128 F.2d 477 (CA 8, 1942).

The ALJ's finding, apparently, that the lights were on, flies in the face of the evidence, and is supported merely by hearsay evidence. Under the circumstances herein, hearsay evidence does not constitute probative and substantial evidence.

In order to find Respondent guilty of violating the old FAR section 91.87 (h), the ALJ had to find reliable, probative and substantial evidence placing Respondent in the "runway environment," across a hold short line. No witness was able to identify the hold line on any exhibit (Tr. 47, 107, 110). In fact, the hold line at runway 17-35 is visible from the tower only with the use of binoculars (Tr. 131). No witness used binoculars to sight Respondent and his position with relation to the hold line (Tr. 132). The Respondent and Mr. Smith both were in a better position to determine the position of the aircraft relative to the hold short line (Tr. 141). Both Respondent and Mr. Smith said they did not cross the line. Respondent knew he had not crossed the hold line because of his angled view of the white runway lights on runway 17-35 (Tr. 241, 246). Bradley Smith stated that no hold short lines were crossed (Tr. 270, 272). In fact, Mr. Smith stated that had they been crossed, they should have seen them on the way back (Tr. 272).

Given that no credibility finding was specifically made on the testimony of these two eyewitnesses, and the Administrator's concession that their position in determining the aircraft's location would be superior, on a dark and rainy night, to the admittedly distant location of those in the tower, the ALJ's decision that a violation of FAR 91.87(h) took place is not supported by probative, reliable, and substantial evidence.

It cannot be found that Respondent was actually on the runway. The ALJ said so, based on what he called "five individuals who have testified positively" as to the alleged incursion. Respondent, though, has shown in previous analysis that the ALJ is completely in error. His count included Mssrs. Pulak, Elkan, Tisdall, and Welsh (Tr. 321). As previously noted, Mr. Elkan was not there,

nor was Mr. Welsh. The ALJ himself finds a paragraph later (Tr. 322), that Mr. Tisdall himself did not see the incursion. Mr. Pulak is counted twice to make up the five (Tr. 322). Mr. Pulak had no independent recollection of the incident, and a mere hearsay document, A-7, was permitted to stand as reliable, probative and substantial evidence, over the convincing statements of Respondent and Bradley Smith.

Both Respondent and Bradley Smith were able to locate the position of the aircraft as nowhere close to runway 17-35 by their angled view of the white runway lights they observed. This evidence is unrebutted.

The ALJ found not a movement past a hold short line, but that Respondent was actually on the runway (Tr. 322). This record just does not support that finding.

The ALJ found Respondent in violation of 91.75(b) as well. Assumedly, although the finding is unclear, this refers to Respondent not turning left onto taxiway U as instructed. We should, though, not have to guess at it. The ID is not clear, and again, in violation of Rule 821.42(b).

Further, the taxiway sign being dimmed or unlit, it is entirely understandable that a left turn was not executed. Respondent did turn onto taxiway U immediately upon realizing he had passed it (Tr. 241). The turn was executed. The hold short line was not crossed. There was no aircraft on the runway. There was no violation of FAR 91.75(b).

With there being no violation of either FAR 91.87(h) nor 91.75(b), no violation of FAR 91.9 can be found (Tr. 181, 187).

It is submitted that Controller Tisdall heard a "stop departures" command after he had cleared a flight for

take-off (Tr. 101). The command was issued by a TRACON controller, apparently Mr. Panella, probably because he was too busy to take another aircraft (Tr. 101). An alternative explanation as to the many problems with this case is that Controller Tisdall did not want to add to Mr. Panella's woes by having the Biz Ex flight 812 depart, but he had already given a Flight 812 a take-off clearance absent an emergency (Tr. 101), one may have been created. Given the lack of specific recollection by either Mr. Riechenback, Quality Assurance personnel, and the BIZEX pilot, it is equally likely that a situation was created to "stop departures" in the form of a runway incursion.

The ALJ failed to consider this possibility, and by not knowing the name of the man who yelled, "stop the departures," or the reasons therefore until the date of the hearing, Respondent was denied the opportunity to pursue this notion.

Conclusion

Under all of the circumstances of this case, it is submitted that the ALJ's findings are not supported by reliable, probative, and substantial evidence. It is submitted that Respondent has been denied due process of law by virtue of the ALJ's many erroneous evidentiary rulings, and intent to pass the record to the Board. It is submitted that the Administrator failed in carrying his burden of proof in showing Respondent had crossed a hold-short line, or had actually been on a runway 17-35. In light of the foregoing, the ALJ's affirmance of the Administrator's Order of Suspension must be reversed, and the Administrator's Complaint dismissed.

Respectfully Submitted,

/s/ Robert D. Powell
Robert D. Powell

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June 7, 1991

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of June, 1991, a copy of the Appeal of Fred W. Beavers was sent by certified mail, return receipt requested, to:

Peter J. Lynch, Esquire
Office of the Chief Counsel
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591

Respectfully submitted,

/s/ Robert D. Powell
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APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

James D. Busey,
Administrator, FAA,

Complainant

v.

Fred W. Beavers,

Respondent

REJOINDER TO ADMINISTRATOR'S OPPOSITION TO MOTION FOR EXTENSION

Comes now Fred W. Beavers, Respondent herein, through counsel, and files this Rejoinder to Administrator's Opposition to Respondent's Motion for Extension to File Appeal Brief, and an Opposition to Motion to Dismiss Appeal. In support whereof, the following is submitted:

1. Counsel for the Administrator was called on May 20, 1991, and asked if there was an objection to an extension for thirty days to file an appeal brief. At the time the request was made, it was Respondent's counsel's belief that the appeal brief was due the week of May 20, 1991.

2. In his response to the request, in addition to agreeing to the extension as "not being a problem," Administrator's counsel acknowledged that the transcript had not been received by the Administrator. It is patently impossible to prepare an appeal brief in this case without such a transcript.

3. The motion for extension states the above point, and also states that the request for an extension was not made earlier because it was hoped that a transcript would be received in time to file an appeal brief. (The Office of Law Judges told Respondent's counsel that he would have the transcript within ten to fifteen days of hearing). When it was not received, following a telephone call to the FAA, a telephone request was immediately made to the Board for an extension, to be followed by a written request.

4. The delay in receiving the transcript was in no way engendered by Respondent or his counsel. The Board's contractor delayed the production of the transcript. The office of Law Judges represented to counsel that the transcript was actually mailed out on May 23, 1991. It was not received by this office until Monday, June 3, 1991.

5. There is absolutely no prejudice to any person by granting the subject motion. Under all the circumstances herein, as good cause for the request, counsel, who has practiced before the Board for almost 24 years, and has *never* missed a filing date, submits that a calculation was made in good faith, that the subject brief was due the week of May 20, 1991. In addition to the many distractions of a busy lawyer, which include the filing of a writ for extraordinary relief in the U.S. Supreme Court on May 17, 1991, it is also submitted that a potentially life-threatening illness to Respondent's counsel's wife was of a major distraction during May, and contributed to the

miscalculation. During the first three weeks of May, counsel had to care for his five children, under age eleven, during his wife's illness. Further, due to the stress engendered by his wife's condition, counsel, a diet controlled Type II diabetic, began experiencing great elevations in blood sugar. On May 9, 1991, his health status required him to be placed on Micronaise for sugar control. In the following two weeks, counsel's blood sugar was on a roller coaster, falling off rapidly, causing confusion and other symptoms of low blood sugar at times, until the proper dosage was established. This medical condition contributed to the miscalculation. The Board has full reason and authority to deal with its procedural rules with respect to filing times, in the instant case, *McHenry v. Bond, Administrator, FAA*, 668 F.2d 1185 (11 Cir., 1982), and grant the requested extension. Good cause for failing to file has been shown.

6. The issues on appeal of this case are substantial. After receipt of the transcript, counsel has identified the major areas for appeal. To begin with, the Administrator produced, *on the day of trial*, a critically important statement of a supposed eye-witness to Respondent's alleged violation of the regulations. This statement was admitted into evidence (Ex. A-7), despite the fact that it was not previously supplied in response to any discovery request specifically designed to require its production (Tr. 146-154). It was offered to refresh the witnesses' recollection, yet he testified he had no independent recollection, and could only recall signing the statement (Tr. 158). Further, the Administrator was unable to produce the original of the statement (Tr. 146-154).

There were many other examples of non-compliance with discovery. Administrator's Exhibits A-1 and A-2 were produced for the first time the morning of the trial,

despite previous and extensive discovery requests. A witness, not included on the Administrator's pre-trial witness list, submitted in response to a discovery request supplemented only one or two working days prior to trial, was permitted to testify. A transcript of the ATC tape, containing the subject incident, covered by a previous discovery request, was produced the day of the hearing, and introduced into evidence (Ex. A-5).

Listening to the catalogue of discovery violations during the hearing, the ALJ remarked (Tr. 17) that he "had a number of complaints about discovery, never this bad in a particular case." He said later that "This is certainly one of the most extreme cases [of non-compliance with discovery] I have ever heard . . . It is an unusual set of circumstances." (Tr. 152). He alluded to the lack of discovery compliance just prior to issuance of his order (Tr. 317).

7. Finally, the ALJ, in his ruling, said that there were "five witnesses who testified positively to the violation where the incursion was made." A review of the record *will show that there were not five witnesses who saw the incursion.* (Tr. 321). A review of the record will show that neither Mssrs. Tisdall, Walsh, nor Elkan saw the incursion. Both in testimony, and by way of interrogatory answer, Mr. Tisdall admits that he did not see the incursion. The Judge actually alludes to this fact in his order (Tr. 322). Mr. Walsh never testified. There is no evidence that he saw the incursion. Mr. Elkan admitted that he did not see the incident. (Tr. 182).

The only person who allegedly saw the incursion was Mr. Pulak. He admitted that outside of his statement, he did not recall the incident (Tr. 158), and that at night, in the rain, the hold signs could probably not be seen

from the tower (Tr. 157), and that the hold short line would be impossible to be seen (Tr. 157).

There was no fifth "witness" testifying either in writing or live. *The ALJ counted Mr. Pulak twice.* The ALJ stated, with respect to controller Tisdall, "While he did not see the incursion, his testimony was that his supervisor informed him that he, the supervisor, had seen the incursion" (Tr. 322). Mr. Pulak was that supervisor (Tr. 143-144).

8. Given the magnitude of the ALJ's error in permitting testimony, and the admission of documentation despite a complete failure in discovery compliance, coupled with his total misevaluation and blatant miscalculation of the number of so-called "eye-witnesses," whose testimony he felt he could not reject (Tr. 322), it would be extremely prejudicial to Respondent to deny him an appellate opportunity. Under the circumstances herein, where the transcript was not even mailed during the time the brief was due, there can be no possible prejudice to the Administrator or the Board's orderly process.

9. Had the instant motion been made routinely, it would have been granted, with or without objection, by the Administrator. That the motion was made a few days later because counsel misconstrued the filing date to be during the week of May 20, 1991, and was waiting for a transcript so as to avoid having to file such a motion, should not be held against Respondent. Respondent is in a position to file an appeal brief by the 15th of June, 1991, the date it would have been due had the extension request been filed on the 15th of May.

Wherefore, it is most respectfully requested that the Motion for Extension of Time be granted, affording Respondent and the Board a full opportunity to review a

highly flawed record, and that the Administrator's Motion to Dismiss be denied.

Respectfully submitted,

/s/ Robert D. Powell
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June 6, 1991

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of June, 1991, a copy of the Opposition to Motion to Dismiss Appeal of Fred W. Beavers was sent by certified mail, return receipt requested, to:

Office of the Chief Counsel
Peter J. Lynch, Esquire
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/s/ Robert D. Powell
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APPENDIX H

BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

JAMES B. BUSEY, Administrator,
Federal Aviation Administration,

Complainant,

v.

FRED W. BEAVERS,

Respondent.

ADMINISTRATOR'S OPPOSITION TO RESPONDENT'S MOTION FOR EXTENSION TO FILE APPEAL BRIEF AND MOTION TO DISMISS APPEAL

The Administrator of the Federal Aviation Administration (FAA) files this opposition to Respondent's motion for extension to file appeal brief and motion to dismiss appeal pursuant to section 821.14 of the Board's Rules of Practice, 49 C.F.R. § 821.14, and states in support thereof the following:

1. A hearing was held on March 26, 1991, before Chief Administrative Law Judge (Judge) William E. Fowler, Jr., in Philadelphia, Pennsylvania.

2. At the conclusion of the hearing, Judge Fowler rendered an oral initial decision and order in which he

found that the Respondent violated sections 91.9, 91.75 (b) and 91.87(h) of the Federal Aviation Regulations, 14 C.F.R. § § 91.9, 91.75(b) and 91.87(h). Tr. 324-325.

3. Judge Fowler explained the appeal procedure by stating that either party may appeal his decision by filing a "Notice of Appeal within ten (10) days of today's Decision, which is dated March 26, 1991, and the Appellant must file a Brief within fifty (50) days of today's Decision to perfect his appeal . . . ." Tr. 327. *See* 49 C.F.R, § § 821.47 and .48.

4. On March 28, 1991, Respondent timely filed a notice of appeal.[1]

5. Respondent's appeal brief or a request for an extension of time to file an appeal brief was due to be filed no later than May 15, 1991, which is 50 days from the date of the oral initial decision and order.

6. On May 20, 1991, Respondent's counsel, Robert D. Powell, contacted me by telephone regarding the FAA's position on Respondent's request for an extension of time to file his appeal brief. I asked Mr. Powell when Respondent's appeal brief was due, and he told me that it was due "this week." Having believed, therefore, that the appeal brief was not yet untimely, I agreed to the 30-day extension of time. In line with *Administrator v. Hooper*, NTSB Order No. EA-2781 (1988), this office does not agree to requests for extensions to file appeal briefs if those requests are made after the due date for the brief.

7. On May 20, 1991, Respondent filed a motion for extension of time to file his appeal brief. His reason for the request was that a hearing transcript had not yet been

[1] Although the notice of appeal was dated September 7, 1990, Respondent's certificate of service was dated March 28, 1991.

prepared, but there was no reason given as to why the request was filed after the date the appeal brief was due.

8. The Board has held that "[a]lthough Respondent identified a sufficient basis for an extension of time to file the brief, we have previously ruled that nonreceipt of the hearing transcript provides good cause for extending the briefing deadline only in those instances where an extension request was submitted *before* the brief was due." *Administrator v. Van Sickle*, NTSB Order No. EA-2410 (1986) (emphasis added).

9. Respondent has not shown or asserted any good cause for his failure to timely file his request for an extension of time to file an appeal brief. Absent such a showing of good cause, Respondent's motion for an extension of time to file an appeal brief should be denied and his appeal should be dismissed. *See Hooper*, NTSB Order No. EA-2781 (1988) at 3-4 (the Board uniformly adheres to a policy requiring dismissal of "all appeals in which timely . . . extension requests to submit those documents have not been filed.").

The Administrator requests that the Board deny Respondent's motion for extension of time and dismiss Respondent's appeal.

Respectfully submitted,

/s/ Peter J. Lynch
Peter J. Lynch
Manager, Enforcement Proceedings
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Federal Aviation Administration
Office of the Chief Counsel
800 Independence Avenue, S. W.
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Dated: May 31, 1991

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by U.S. mail, postage prepaid, certified return-receipt requested, a copy of the Administrator's Opposition to Respondent's Motion for Extension to File Appeal Brief and Motion to Dismiss Appeal in the case of *Administrator v. Fred W. Beavers*, Docket No. SE-11307, addressed to:

Fred W. Beavers
200 Meadow Brook
San Antonio TX 78232

Robert D. Powell, Esq.
Post Office Box 33699
Washington DC 20033-0699

In addition, I hereby certify that on this date I have sent by U.S. mail the original and four copies of the foregoing document to:

Office of the General Counsel
National Transportation Safety
Board
Room 818
800 Independence Avenue, S. W.
Washington, D. C. 20594

/SKC/

Dated: May 31, 1991

APPENDIX I

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

James D. Busey,
Administrator, FAA

Complainant

v.

Fred W. Beavers,

Respondent

MOTION FOR EXTENSION
TO FILE APPEAL BRIEF

Comes now Fred W. Beavers, by counsel, and files this motion for an extension of time in which to file an appeal brief. In support whereof, the following is submitted.

1. Hearing in this matter took place on March 24, 1991, resulting in an oral decision by ALJ Fowler.

2. An appeal was filed on March 28, 1991.

3. To this date, neither the ALJ's office, counsel for Petitioner, nor FAA has received a copy of the transcript nor a copy of the ALJ's order.

4. Counsel for Petitioner was informed by the ALJ's office that such copies should have been received by them on April 8, 1991, but were not.

5. Without the transcript and ALJ's order, it is impossible to file an appeal brief in this case.

6. This motion is made at this time because it had been hoped that a transcript would have been received by last week, making it unnecessary to request an extension.

7. No prejudice will accrue to any party by grant of this motion. By denial, Petitioner will be denied due process, inasmuch as a filing delay at this point is attributable to causes beyond Petitioner's control.

8. Counsel for the FAA has been contacted, and indicates no objection to an extension of thirty days.

Respectfully Submitted,

/s/ Robert D. Powell
Robert D. Powell
Attorney for
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P. O. Box 33699
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May 20, 1991

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of May, 1991, a copy of the Motion for Extension to File Appeal Brief of Fred Beavers was sent by certified mail, return receipt requested, to:

Office of Chief Counsel
Peter Lynch, Esquire
Federal Aviation Administration
800 Independence Ave., S. W.
Washington, D. C. 20591

/s/ Robert D. Powell
Robert D. Powell, Esquire
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2033 M St. NW
Washington, D. C. 20036

APPENDIX J

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL TRANSPORTATION SAFETY BOARD

Docket No. SE-11307

James D. Busey,
Administrator, FAA

Complainant

v.

Fred. W. Beavers,

Respondent

APPEAL

Comes now Fred W. Beavers, by his counsel, Robert D. Powell, Esq., under Rule 821.47, and hereby files this Notice of Appeal of the ruling of the ALJ in the instant case, dismissing Respondent's Appeal of the FAA Order, and affirming the Order in its entirety.

Respectfully Submitted,

/s/ Robert D. Powell
Robert D. Powell
Attorney for
Fred W. Beavers
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CERTIFICATE OF SERVICE

This is to certify that on this 28th day of March, 1991, a copy of the Appeal of Fred W. Beavers was sent by certified mail, return receipt requested, to:

Office of the Assistant Chief Counsel
Jacqueline Stanford, Esquire
Federal Aviation Administration
Fitzgerald Office Building
JFK International Airport
Jamaica, NY 11430

/s/ Robert D. Powell
Robert D. Powell, Esquire
P. O. Box 33699
Washington, D. C. 20033-0699
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APPENDIX K

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE JUDGES

Docket Number SE-11307

JAMES B. BUSEY, Administrator
Federal Aviation Administration,

Complainant,

against

FRED W. BEAVERS,

Respondent.

APPEAL OF THE ORDER OF THE
REGIONAL COUNSEL, EASTERN REGION
FEDERAL AVIATION ADMINISTRATION
DATED AUGUST 14, 1991

Jacqueline Stanford, Esquire, on behalf of the Complainant
Robert D. Powell, Esquire, on behalf of the Respondent

ORAL INITIAL DECISION AND ORDER

WILLIAM E. FOWLER, JR.
Chief Judge

[319] CHIEF JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board

held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was amended on the appeal of Fred W. Beavers from an Order of Suspension issued by the Federal Aviation Administration, through its Administrator; said Order of Suspension, dated August 14, 1990, purports to suspend Respondent Beavers' Airline Transport Pilot's Certificate, Number 001626567, for a period of 60 days.

The Administrator's Order of Suspension, as set forth in the National Transportation Safety Board's Rules of Air Safety Enforcement Proceedings, serves as the Complaint and was filed on behalf of the Administrator of the Federal Aviation Administration, herein the Complainant, through his Regional Counsel, Eastern Region of the Federal Aviation Administration.

This matter has been heard before this United States Administrative Law Judge and, as if provided by the Board's Rules of Practice, specifically Section 821.42 of those Rules, I have chosen to invoke the option granted to me under that Section of the Rules to issue a bench decision or, as the Rules refer to it, an Oral Initial Decision forthwith at this time as opposed to a subsequent written decision.

Following notice to the parties this matter came on for trial on March 26, 1991 in Philadelphia, Pennsylvania. The [320] Respondent was present at all times and was very ably represented by Robert D. Powell, Esquire. The Complainant was very ably represented by one of this staff, Jacqueline Stanford, Esquire of the Regional Counsel's Office, Eastern Region of the Federal Aviation Administration.

The parties have been afforded full opportunity to offer evidence; and to call, examine and cross examine

witnesses. In addition, the parties were afforded the opportunity to make argument in support of their respective positions.

As Counsel stated during the course of final argument, once again the Judge is confronted, in the main here, with the issue of credibility. "Who are you going to believe?" You cannot believe both sides of this case.

The Respondent's position is that the pilot and copilot were there; they were closest to the scene; the weather was abysmal; it was dark, and conditions of visibility were limited; that they were being vigilant; and that they were not wholly familiar with the terrain and the environment of the Philadelphia International Airport.

Nevertheless, Respondent's position was, and is, that they saw that they had gone beyond Taxiway U. They immediately executed a 180-degree turn so as to not have a runway incursion.

[321] It is interesting to me that Inspector Elkan, who apparently made the final decision to proceed to process this matter as an enforcement proceeding, said first in response to my question that at first he thought the weather and the lack of lighting, according to the Respondent,—and there were apparently several conferences here, and certainly an informal conference where there was a thorough airing of the facts and circumstances pertaining to this incident—that there might be some mitigating facts and circumstances where the Respondent, Mr. Beavers, was concerned.

However, after a full and complete investigation, and talking to everyone who has testified here or who has signed off on documentary Exhibits which are part of the record—and, incidentally, we have a total of 10 Exhibits the Administrator has adduced, all of which have

been admitted into evidence; and there have been 4 Exhibits on behalf of the Respondent, which have been admitted; the Administrator had four witnesses testify, the Respondent had three including Respondent, himself—I am not going to belabor the facts in this case.

It comes down to an issue here of credibility.

The Administrator has had, either through live testimony or through documentary Exhibits, four witnesses—Messrs. Pulak, Elkan, Tisdall and Walsh who signed off one of the Exhibits here—state without hesitation that—as [322] Administrator's Exhibit Number A-5, the transcript, would indicate—the Respondent was on Runway 17 as the Administrator's Order of Suspension has charged.

In addition to that, you may recall, there was the testimony of Air Traffic Controller Tisdall. While he did not see the incursion, his testimony was that his supervisor informed him that he, the supervisor, had seen the incursion.

That means we have at least five individuals who have testified positively to the violation where the incursion was concerned on behalf of the Administrator. I cannot reject, in whole or in part, these witnesses' testimony or the documentary Exhibits.

To buttress this determination, since you can tell which way I am going to come, is the fact that on the very same evening, later on, the Respondent made a second landing at this same airport. Respondent's testimony, and the Administrator's witnesses' testimony, is that the conditions were the same: it was dark, the weather was bad. But, yet, on the second landing there was no problem: no incursion of any runway. Everything was fine.

Therefore, ladies and gentlemen, while this case is not everything that it should have been, as I have said in my opening remarks, in the final analysis it is my determination that the Administrator has successfully proven, by a fair and reasonable preponderance of the material, relevant and [323] probative evidence, all the allegations as he has set them forth in his Order of Suspension of August 14, 1990.

It is very interesting on the part of the Respondent's defense here that they brought in an aviation psychologist, an aviation engineer. Unfortunately for them all of this gentleman's survey, conclusions and analysis was made during the daylight hours which, to me, is wholly inapplicable to this case.

This case occurred in dark conditions, the weather was bad and so forth.

Need I say more. I am sure you have arrived at the drift of my determination. In the face of the live testimony coupled with the documentary Exhibits, as I previously alluded, I have to find that the Administrator's Order of Suspension of August 14, 1990 was validly made and premised, and it was not arbitrary or capricious at all as to what occurred on the evening of October 27, 1987 at the Philadelphia International Airport where the Respondent, Fred W. Beavers, the pilot in command of this aircraft at that date, time and place, is concerned.

As Counsel for the Administrator said, perhaps with a greater exercise of due care by the Respondent, we would not have been here today and this evening for this case. He exercised that due care, there is no question about it, on his second landing. He had no problem whatsoever, as I stated [324] earlier.

Therefore, ladies and gentlemen, based on my review of all of the testimony coupled with the documentary

Exhibits, I would proceed at this time to make the following specific findings of fact and conclusions of law:

Findings of Fact and Conclusions of Law

One, the Respondent, Fred W. Beavers, admits, and it is found, that he was and is the holder of Airline Transport Pilot's Certificate Number 001626567;

Two, the Respondent admits, and it is found, that on or about October 27, 1987 the Respondent acted as pilot in command of a Cessna 550 aircraft, Identification Number N260CC, which landed at the Philadelphia International Airport;

Three, Respondent admits, and it is found, that after landing N260CC Respondent was instructed by Air Traffic Control to hold short of Runway 9 at Taxiway U;

Four, the Respondent admits, and it is found, that N260CC acknowledged the above-described instruction;

Five, the Respondent admits, and it is found, that subsequently N260CC was instructed by Air Traffic Control to turn left onto Taxiway U and to cross Runway 9-Left;

Six, Respondent admits, and it is found, that N260CC acknowledged the above-described instruction;

Seven, it is found that N260CC failed to follow the above-described instruction:

[325] Eight, it is found that, in addition, N260CC taxied onto Runway 17, which was an active runway;

Nine, it is found that by reason of the foregoing the Respondent, Fred W. Beavers, violated the following Sections of the Federal Aviation Regulations: one, Section 91.09, which prohibits any person from operating an aircraft in a careless manner so as to potentially endanger the life and property of another; two, Section 91.75

(b), which states that "Except in an emergency, no person may, in an area in which Air Traffic Control is exercised, operate an aircraft contrary to an Air Traffic Control instruction"; three, Section 91.87(h), which states that "No person may, at any aircraft with an operation control tower, operate an aircraft on a runway or taxiway unless an appropriate clearance is received from Air Traffic Control; and

Ten, this Judge finds that safety in air commerce or in air transportation and the public does require the affirmation of the Administrator's Order of Suspension dated August 14, 1990 in view of Respondent's violation of Section 91.09, Section 91.75(b) and Section 91.87(h) of the Federal Aviation Regulations.

Order

IT IS ORDERED that the Administrator's Order of Suspension dated August 24, 1990 be, and the same hereby is, affirmed.

[326] This order is issued by William E. Fowler, Jr., a United States Administrative Law Judge.

William E. Fowler, Jr.
United States Administrative Law Judge

DATED this 26th day of
March, 1991 at
Philadelphia, Pennsylvania.

[327] *Appeal*

Either party to this proceeding may appeal the Judge's Oral Initial Decision. The Appellant shall file his Notice

of Appeal within ten (10) days of today's Decision, which is dated March 26, 1991, and the Appellant must file a Brief within fifty (50) days of today's Decision to perfect his Appeal and to set forth his objections to the Judge's Oral Initial Decision.

The Notice of Appeal and the Brief shall be filed with the National Transportation Safety Board, Docket Section, 1951 Kidwell Drive, Suite 505, Vienna, Virginia 22182.

If no Appeal to the National Transportation Safety Board from either party is received or the Board, of its own volition does not file a Motion to Review the Judge's Decision within the time allowed, the Judge's Decision shall become final.

Timely filing of such an Appeal, however, shall stay the Order as set forth in the Judge's Decision.

Let me state further that in lieu of an Appeal the period of suspension shall become operative immediately upon the physical surrender of the Respondent's Airline Transport Pilot's Certificate to the Administrator or to Counsel for the Administrator.

[328] MR. POWELL: Your Honor, we had a NASA report filed that the Administrator dealt with at the outset.

CHIEF JUDGE FOWLER: Thank you, Mr. Powell. It had temporarily slipped my mind.

Let the record further indicate that the Respondent having timely filed a NASA report, which Administrator has acknowledged on the record during the course of this proceeding, there will be no sanction imposed; and any previous reference to a sanction was in error in which I mis-spoke myself, and which the record will disregard.

Off the record.

[A brief discussion was held off the record.]

CHIEF JUDGE FOWLER: Let the record indicate that Counsel for the Respondent has stated there will be an Appeal filed from the Judge's Decision just issued.

If there is nothing further at this time, I would declare the hearing close. However, before we go off the record for the last time I want to once again express my thanks to Counsel for the parties for their very respectful and learned efforts. I want to also express my thanks to the witnesses and to all those in attendance for your help, your assistance and your cooperation, as well as for your participation during the course of this proceeding.

Thank you all very much. The hearing is closed.

[At 9:00 p.m., the hearing was concluded.]

REPORTER'S CERTIFICATE

CASE TITLE:	FAA vs. Fred W. Beavers
DOCKET NO.:	SE-11307
HEARING DATE:	Tuesday, March 26, 1991
LOCATION:	United States Tax Court Chestnut Building, Room 1320 Philadelphia, Pa.

I hereby certify that the proceedings and evidence are fully and accurately recorded in the attached transcript from the tapes and notes reported by me in the above case before the:

National Transportation Safety Board

DATE: March 28, 1991

/s/ Kenneth Reed
Official Reporter
Executive Court Reporters
8525 Colesville Road, Suite 9
Silver Spring, Maryland 20910